Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 77-1490

LEARIE LEO ALFORD,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

LEARIE LEO ALFORD,
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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion (A1) of the Supreme Court of Florida denying the motion to vacate petitioner's sentence of death is not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). Petitioner asserts a deprivation of rights secured by the United States Constitution.

The order of the Florida Supreme Court was entered on November 10, 1977, and petition for rehearing was denied on March 9, 1978 (A8).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clauses of the 5th and 14th Amendments to the United States Constitution.

QUESTION PRESENTED

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW, WHERE THE JUDGE WHO SENTENCED HIM TO DEATH WAS AWARE OF PRE-SENTENCE INVESTIGATIVE MATERIAL NOT AVAILABLE TO PETITIONER BUT STATES THAT HE DISREGARDED SAID INFORMATION.

STATEMENT OF THE CASE

Petitioner was convicted of murder and rape in the Circuit Court for Palm Beach County, Florida. The jury recommended that the petitioner be sentenced to death. The trial judge, after considering a pre-sentence investigation report, sentenced petitioner to death.

The judgment and sentence were affirmed by the Florida Supreme Court. *Alford* v. *State*, 307 So.2d 433 (Fla. 1975).

On May 6, 1977, following the decision of this Court in *Gardner* v. *Florida*, 97 S.Ct. 1197, the Florida Supreme Court entered an order directing the trial judge who imposed the death sentence in this case to file a response with the Florida Supreme Court stating whether he had considered any information unknown to the appellant

(A13). The trial court filed a response certifying that he did not consider information unknown to the petitioner (A12).

Petitioner then filed a motion to vacate the death sentence in the Florida Supreme Court alleging that the confidential evaluation from the parole and probation officer of September 17, 1973, demonstrated that some of this confidential information was provided to the trial judge who subsequently determined that he should not consider it (A9-A10). This officer testified that he had discussed on several occasions with the judge, in connection with the sentence to be subsequently imposed, confidential information which was not available to petitioner (A15-A17).

On November 16, 1977, the Florida Supreme Court, in a 4 to 3 decision, denied the motion to vacate (A4). The basis of the court's opinion was that it makes no difference if the trial court is "aware" of confidential information not available to a defendant. So long as the trial court does not "consider" such information, then the requirements of *Gardner* have been complied with.

There were two dissenting opinions filed. The first dissenting opinion was by Justice Boyd who stated that if the sentencing judge is "made aware" of undisclosed facts, then *Gardner* requires that these undisclosed facts be presented to petitioner with an opportunity to refute them before the trial court.

Justice Hatchett also dissented. The basis of his dissent was that the trial court can only disregard material if it has been presented to the defendant for examination, and only after defendant has been provided an opportunity to contest the accuracy of the facts. Justices Boyd and Sundberg concurred in that dissenting opinion.

ARGUMENT

The Florida Supreme Court found on page 2 of its opinion (A3) that the judge had been "made aware" of some facts which were not available to the petitioner. The trial court did state that it did not "consider" any information which was unknown to petitioner.

In a 4 to 3 decision, the Florida Supreme Court construed the *Gardner* case to mean that it is not improper for the judge to be aware of facts which are not available to the defendant, so long as he disregards those facts when imposing sentence.

That opinion (A4) was concurred in by 3 justices in addition to the author of the opinion. The three remaining justices on this 7 man court dissented. They construed *Gardner* to mean that all material must be presented to the defendant, if the court has been made aware of it, and defendant must be provided an opportunity to test the accuracy of any facts.

The basis of the holding of the majority of the Florida Supreme Court is found in the following paragraph on page 1205 of the *Gardner* opinion:

> "The State also suggests that full disclosure of the presentence report will unnecessarily delay the proceeding. We think the likelihood of significant delay is overstated because we must presume that reports prepared by professional probation officers, as the Florida procedure requires, are generally reliable. In those cases in which the accuracy of a report is contested, *the trial judge can avoid delay by disregarding the disputed material.* Or if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." 97 S.Ct. 1197, 1205 (emphasized material was emphasized by the Florida Supreme Court in its opinion).

The Florida Supreme Court held that due process is followed so long as the sentencing judge "disregards" the confidential information not revealed to the defendant.

The issue in this case thus boils down to what this Court means by "disregarding the disputed material." The dissenting opinion of Justice Hatchett, which was concurred in by the two other dissenting justices, stated:

> "The majority has construed *Gardner* as recognizing 'the ability of the sentencing judge to disregard material in imposing a sentence.' This construction is based upon the statement that:
>
> > In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. *Gardner* v. *Florida*, supra, at 1205.
>
> However, I believe a reading of the entire paragraph from which that quotation is excised, makes it clear that the Court in *Gardner* meant a trial court can disregard for examination, and only after the defendant has been provided an opportunity to contest the accuracy of any facts. If the contested material is of critical importance, then the trial court may not merely disregard it, but rather must make a full inquiry and resolve the dispute."

We believe the point made by the dissenting justices is confirmed by the use of the term "disputed material" following the term "disregarding".

In the present case the defendant was never made aware of the confidential material and accordingly there was no basis for a dispute at the time the sentencing judge was made aware of it. The only way such material can become disputed is if the defendant knows of it. How can a defendant dispute material when he is not aware of it?

We respectfully suggest that what this Court meant was that the defendant must be given access to the information which is given the sentencing judge. The defendant may then dispute some of the material in this information. The trial judge can, *after* the defendant has been given the opportunity to point out that material which he "disputes", ignore or disregard the "disputed material" and impose sentence.

The majority opinion of the Florida Supreme Court is not logical because it is not possible for the trial judge to know what material is in dispute, if defendant has not been given an opportunity to point it out. In the present case the record shows, as the opinion of the Florida Supreme Court indicates, that confidential information was revealed to the trial court and not to petitioner. The majority of the Court concluded that the trial court disregarded the disputed material, however there is nothing in the record in this case to show how the trial judge would know what material was disputed.

CONCLUSION

The opinion of this Court in *Gardner* v. *State* requires that this petitioner, prior to sentence of death, should have been informed of the same material which the sentencing court reviewed prior to passing sentence. The Florida Supreme Court, in a 4 to 3 decision, has misconstrued the intent of this Court, by affirming a sentence of death where the sentencing court was aware of information not made available to petitioner. The sentence of death should be vacated.

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION, AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1977

CASE NO. 44,647

Circuit Court Case No. 73-159 CF

LEARIE LEO ALFORD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed November 10, 1977

An Appeal from the Circuit Court in and for Palm Beach County, Marvin U. Mounts, Jr., Judge

David Roth of Cone, Owen, Wagner, Nugent, Johnson & McKeown, West Palm Beach, for Appellant

Robert L. Shevin, Attorney General, Tallahassee; and Raymond L. Marky, Assistant Attorney General, Tallahassee, for Appellee

ADKINS, J.

We have for consideration a motion of Learie Leo Alford to vacate his sentence of death.

Alford's judgment and sentence were affirmed by this Court (*Alford* v. *State*, 307 So.2d 433), and the United States Supreme Court denied his petition for writ of cer-

tiorari (428 U.S. 912). In accordance with the rule of law pronounced in *Gardner* v. *State*, 45 U.S.L.W. 4275, 97 S.Ct. 1197, this Court ordered the sentencing judge to state whether he based his sentencing decision upon any information not known to Alford. The trial judge responded that he did not consider any information unknown to Alford and enclosed a letter which he wrote to the probation supervisor prior to sentencing, saying:

> "I know you have expended a great deal of time, effort and conscientious evaluation in the preparation of the pre-sentence report concerning Learie Leo Alford. I recall that you indicated to me that the revelation of the confidential section of this report to the defense would be damaging and compromising to sources who had confided in you. I respect your judgment in this.
>
> "I feel, however, in a case in which the jury has recommended the supreme penalty known to our law, that there well may be a constitutional right to disclosure of this confidential section to the defendant. As far as I know, there is not yet a judicial decision on what the meaning of 'factual material' in Rule 3.713(b) may be. I feel that if I cannot release the confidential section to the defendant, I should not review it myself in this particular case. I know that this means that I shall not have the benefit of a major portion of your work in this report because of this view and I regret that this is so.
>
> "Accordingly, do not deliver that section of your report to me."

During the course of the clemency proceeding, the Governor wrote Alford's attorney and enclosed a copy of the confidential evaluation portion of the pre-sentence in-

vestigation. The first paragraph of the confidential evaluation indicates that the sentencing judge was "made aware of some of these facts" by the supervisor.

In response to the motion to vacate, the State says that, assuming the judge was "made aware" of certain facts, that doesn't mean that he "considered" those facts in imposing the sentence. The State draws a distinction between being "aware" of certain facts and "considering" them. We agree.

The United States Supreme Court in *Gardner* recognized the ability of the sentencing judge to disregard material in imposing sentence when it said:

> "In those cases in which the accuracy of a report is contested, *the trial judge can avoid delay by disregarding the disputed material.*" (Emphasis supplied.)

The judicial discretion exercised in imposing the death sentence is limited in such a manner that the judge may not consider many factors of which he is aware. As pointed out in *Proffitt* v. *Florida*, 428 U.S. 242 (1976),

> "[I]t has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.
>
> * * *
>
> "Under Florida's capital-sentencing procedures, in sum, trial *judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life.* Moreover,

their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances.

* * *

"The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." (Emphasis supplied.)

In considering the imposition of the sentence, the trial judge's discretion is guided and channeled by statute and case law. He may be "aware" of other factors, but he does not "consider" these factors in the exercise of his discretion. For example, the judge may be "aware" of inadmissible evidence after a proffer has been made, but this evidence is never "considered" by the judge.

The record clearly shows that the trial judge complied with the requirements of *Gardner* and the motion to vacate is denied.

It is so ordered.

OVERTON, C.J., ENGLAND and KARL, JJ., Concur

BOYD, J., Dissents with an opinion

HATCHETT, J., Dissents with an opinion with which BOYD and SUNDBERG, JJ., Concur

BOYD, J., Dissenting.

During the course of the clemency proceeding, the Governor wrote Alford's attorney and enclosed a copy of the confidential evaluation portion of the pre-sentence investigation. The first paragraph of the confidential evaluation indicates that the sentencing judge was "made aware of some of [the report's] facts" by the supervisor.

The trial court, however, has filed a copy of a letter sent to the probation supervisor prior to sentencing directing that the confidential portion of the report not be delivered to him. If, in fact, however, the sentencing judge was "made aware" by the supervisor of some of the report's undisclosed facts, constitutional standards announced in *Gardner* v. *State*, supra, require that the undisclosed facts now be presented to appellant with an opportunity to refute them before the trial judge, if he should see fit.

In criminal proceedings, it is unconstitutional for courts to receive testimony concerning guilt without affording the accused an opportunity to know, confront and cross-examine the witnesses appearing against him. In my opinion, it is likewise unconstitutional for courts to impose sentences upon persons convicted of crime without affording the accused persons an opportunity to refute any information known to the sentencing judge. Without providing such protection, incorrect representations, perhaps made in good faith, could be used by the court to give punishment more severe than would otherwise be imposed.

Such protection is more important in capital cases, where the defendant's life is at stake, than in any other kind of case.

It is my opinion that prior to making a final determination in this cause, it should be remanded to the trial court with directions that, if any portion of the confidential record was made known to the judge, it be presented to the appellant with an opportunity to refute those statements. If, indeed, the judge did not know of information undisclosed to the defense, he should so advise this Court before the Court makes a final determination of this cause.

HATCHETT, J., dissenting.

I dissent from the majority opinion which denies Alford's motion to vacate his death sentence on the grounds that the trial court was made aware of facts during the sentencing phase of the trial proceedings which were not disclosed to defense counsel. The majority attempts to create a distinction between the trial court's "considering" this confidential information and his merely being "aware" of these facts. Allowing such a distinction to be made by the trial court violates the rationale in *Gardner* v. *Florida*, 97 S.Ct. 1197 (1977) by violating the defendant's due process right to be given notice of and an opportunity to challenge any facts presented to the trial court relevant to its sentencing determination.

The majority has construed *Gardner* as recognizing "the ability of the sentencing judge to disregard material in imposing a sentence." This construction is based upon the statement that:

> In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. *Gardner* v. *Florida*, supra, at 1205.

However, I believe a reading of the entire paragraph from which that quotation is excised,* makes it clear that the Court in *Gardner* meant a trial court can disregard material only if it has been presented to the defendant for examination, and only after the defendant has been provided an opportunity to contest the accuracy of any facts. If the contested material is of critical importance, then the trial court may not merely disregard it, but rather must make a full inquiry and resolve the dispute.

Although the confidentiality of sources is an important state interest, it is clearly outweighed by the due process rights of a defendant sentenced to death.

BOYD and SUNDBERG, JJ., Concur.

---

*The State also suggests that full disclosure of the presentence report will unnecessarily delay the proceeding. We think the likelihood of significant delay is overstated because we must presume that reports prepared by professional probation officers, as the Florida procedure requires, are generally reliable. In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. *Or if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.* (Footnotes omitted) Gardner v. Florida, supra, at p. 1205. (emphasis added)

IN THE SUPREME COURT OF FLORIDA
THURSDAY, MARCH 9, 1978

CASE NO. 44,647

Circuit Court Case No. 73-159 CF

LEARIE LEO ALFORD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

On consideration of the petition for rehearing filed by attorneys for appellant, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C.J., ADKINS, ENGLAND, SUNDBERG and KARL, JJ., Concur

BOYD and HATCHETT, JJ., Dissent

ORDERED that the motion for stay filed by attorneys for appellant is hereby granted and proceedings in this Court and in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, are hereby stayed to and including April 10, 1978, to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

cc: Hon. John B. Dunkle, Clerk
Hon. Marvin U. Mounts, Jr., Judge
David Roth, Esquire
of Cone, Owen, Wagner, Nugent, Johnson & McKeown
Raymond L. Marky, Esquire
Barry Krischer, Esquire

IN THE SUPREME COURT, STATE OF FLORIDA

CASE NO. 44,647

Circuit Court in and for Palm Beach County 73-159-CF

LEARIE LEO ALFORD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

MOTION TO VACATE DEATH SENTENCE

COMES NOW the Appellant, LEARIE LEO ALFORD, by and through his undersigned attorneys, and pursuant to this Honorable Court's Order of May 6, 1977, and respectfully urges the Court to set aside the death sentence herein.

As grounds therefor, Appellant would respectfully show as follows:

1. On June 8, 1977, his attorney received a letter from the Office of the Honorable Reubin O'D. Askew, Governor of the State of Florida, enclosing therein a copy of the confidential evaluation portion of the presentence investigation ordered by the Honorable Marvin U. Mounts, Jr., the presiding Circuit Judge in the trial of this cause. A copy of the letter and the enclosure is attached hereto and incorporated herein by reference as Appellant's "Exhibit A".

2. The confidential evaluation dated September 17, 1973, affirmatively contradicts the response to the Order of the Supreme Court submitted by the Honorable Marvin U. Mounts, Jr. on May 10, 1977. Specifically, the first paragraph of the confidential evaluation indicates that the

aforementioned Circuit Judge was made aware of certain facts during his discussion with the Parole and Probation Officer. These facts could not be, and were not, denied or explained by the Appellant as he was unaware of the discussion between the Probation Supervisor and the Trial Judge.

3. Appellant was denied due process of law when the death penalty herein was imposed where he had no opportunity to deny or explain the aforementioned facts.

See *Garner* v. *Florida*, 45 U.S.L.W. 4275 (March 22, 1977).

WHEREFORE, Appellant respectfully requests that the Court issue an immediate stay of sentence herein, pending a fully evidentiary hearing with respect to the aforementioned allegations. Further, pursuant to this Court's Order of May 6, 1977, it is requested that the attached Exhibit "A" be sealed in order to maintain the confidentiality of the material therein.

Respectfully submitted,

Cone, Owen, Wagner, Nugent, Johnson
& McKeown, P.A.
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305 655-8100
By /s/ David Roth
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to HONORABLE RAYMOND L. MARKY, ESQUIRE, Attorney General's Office, The Capitol, Tallahassee, Florida, HONORABLE DAVID BLUDWORTH, ESQUIRE, State Attorney, 430 Palm Beach County Courthouse, West Palm Beach, Florida 33401 and HONORABLE MARVIN U. MOUNTS, JR., Circuit Judge, Criminal Division, Palm Beach County Courthouse, West Palm Beach, Florida 33401, this 9th day of June, 1977.

/s/ David Roth

cc: Joel T. Daves III, Esquire
Earl Trent, Esquire

IN THE SUPREME COURT OF FLORIDA
TUESDAY, MAY 10, 1977

CASE NO. 44,647

Circuit Court in and for Palm Beach County 73-159 CF

LEARIE LEO ALFORD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

RESPONSE TO THE ORDER OF THE SUPREME COURT

Comes now the undersigned Circuit Court Judge and represents to this Court that he did not consider information unknown to the Appellant in conjunction with any matter in this case. To the best of my knowledge, recollection and belief the Appellant and his attorneys had access to all information and facts that were available to me. I enclose, for the Court's consideration, a copy of my letter to the Probation Supervisor in this case which reflects that I declined to consider the Confidential Information not available to the Appellant.

Respectfully submitted, this 10th day of May, 1977, West Palm Beach, Palm Beach County, Florida.

/s/ Marvin Mounts, Jr.
Circuit Judge
15th Judicial Circuit

Hon. John B. Dunkle, Clark
Joel T. Daves III, Esquire
David Roth, Esquire
Raymond L. Marky, Esquire
Zell Davis, Jr., Esquire
Carl Harper, Asst. State Attorney
15th Judicial Circuit

IN THE SUPREME COURT OF FLORIDA
FRIDAY, MAY 6, 1977

CASE NO. 44,647

Circuit Court in and for Palm Beach County 73-159CF

LEARIE LEO ALFORD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

The Supreme Court of the United States, in *Gardner* v. *Florida*, 45 U.S.L.W. 4275 (March 22, 1977), ruled that it is a denial of due process for the death sentence to be imposed when the trial judge, in weighing the aggravating and mitigating circumstances of the case, considers information which the appellant had no opportunity to deny or explain. To avoid multiple legal proceedings in various courts concerning this rule of law, and to provide a uniform procedure for the hearing of applications for relief filed in reliance on *Gardner*, the following procedure for the above completed death case is ordered:

1. The trial judge who imposed the death sentence in the listed case is directed to file a response with this Court within twenty days stating whether he imposed the death sentence in the identified cause on the basis of consideration of any information not known to appellant, whether it be a presentence investigation, juvenile case file information, psychiatric reports, or otherwise. In the event no such information was used, the trial judge shall so affirmatively state in his response. In the event the death sentence was imposed on the basis of any such information not known to the appellant, the trial judge

is directed to file with this Court a copy of the material containing this information. Copies of the response together with copies of any sentencing information shall be furnished to counsel for the State and counsel for the appellant. If the information is confidential, counsel for both parties shall maintain its confidentiality until otherwise ordered by this Court.

2. Application for relief pursuant to the United States Supreme Court's ruling in *Gardner* v. *Florida, supra,* for the listed case shall be filed within thirty days after the trial judge has filed his response with this Court pursuant to this order.

The procedure is adopted for the sole purpose of properly implementing the *Gardner* decision and to avoid multiple actions in various courts.

TC

cc: Hon. Marvin U. Mounts, Jr., Judge
Hon. John B. Dunkle, Clark
Joel T. Daves, III, Esquire
David Roth, Esquire
Raymond L. Marky, Esquire
Zell Davis, Jr., Esquire

DEPOSITION OF JOEL PADGETT

(Pages 7-11)

[7] Q. Did you, during the course of your conversations with Judge Mounts, relate to him any facts that are set forth in the confidential evaluation? A. To the best of my recollection, I don't know how many facts—I don't recall the specific conversation and I only recall vaguely—like I say, there were many occasions when we talked. I do remember starting to tell him about the person in the County Jail, the confidential source of information which had been given to me and about other things being involved.

I believe it is the best of my recollection that he cut me off, at that point and said that, you know, "I don't want to know about that, due to the nature, and so forth," and that he thought that he would have to release that to the defense attorney if he knew about it, if he knew about the facts and so forth and I believe it was after that that he made the decision that he did not want to see the confidential part of that pre-sentence investigation.

Q. Do you remember specifically whether or not you advised Judge Mounts that the defendant had [8] admitted to the confidential informant that he had committed this murder? A. I can't recall specifically whether or not I told him that. I can't remember specifically how much of that information that I had gotten from the man at the jail that I told him. I very well might have, but I can't remember specifically how much I told him and how much I didn't tell him.

Q. On June 9th, 1977, did you have a conversation with me concerning your knowledge about relating the confidential facts to the Judge? A. I had a conversation

with you on the telephone one day, yes; I suppose that is correct, yes.

Q. Did I send you a latter, which I am handing you now, dated June 10th, 1977, with respect to that telephone conversation? A. Yes.

Q. And did you discuss that letter with me subsequently and tell me that it was an accurate reflection of our conversation? A. Yes.

Q. Specifically, with respect to paragraph three of that letter, you indicated that you did recall some discussion about Mr. Alford's [9] involvement with prostitutes? A. Yes.

Q. Do you recall relating that to the Judge, as of this date? A. I don't—I don't recall how much of the information about the prostitutes or about Emmett Simpson or about—I don't recall specifically what I informed the Judge. I believe that I informed him, but I can't remember specifically what I did and what I did not inform him.

Q. Simpson was a well known drug dealer in the community, at that time? A. Pimp.

Q. And drug dealer? A. Yes, he deals drugs too.

Q. So, you do recall discussing his alleged involvement with him and his alleged involvement with prostitutes, him being Learie Leo Alford, but you do not recall specifically what you told him in that respect; is that a fair statement? A. Yes, I'd say that that is a fair statement.

Q. Also, would it be a fair statement that you believe you advised Judge Mounts that he, Learie [10] Leo Alford, admitted the murder to the informant, but you do not recall specifically what you said, in that respect? A. No, I can't remember whether or not I told the Judge that he admitted to this informant or whatever at the jail. I can't remember how much of all that, because there was so much that the informant in the jail was

telling me about Alford and about his connections with prostitutes and with all of this. I don't remember whether or not I specifically told the Judge that Alford admitted doing it.

Q. You do recall on at least several occasions relating to the Judge the general content of your conversations with Mr. Hathaway, the confidential informant, with respect to Mr. Alford's alleged activities? A. Some of it, yes. Like I say, somewhere along the time where the information was starting to get indicative of another motive or of other crimes or something like that, the Judge did not want to hear anything about that, you know, if it started getting more specific or whatever. I can't remember at what point we stopped discussing it because he didn't want to [11] hear any more.

Q. In the letter itself it indicated, and I believe you have testified that it is an accurate reflection of our conversation, that you believe you advised Judge Mounts that he admitted committing the murder to the confidential informant. Was that your belief on June 9th, 1977? A. Well, I am not sure that each word and the exact phrasing in your letter is exactly as the phone conversation. I believe in our phone conversation that I stated that I believed that I might have or that it is very possible that I did, not that I believe that I did do it. I believe that I might have done it. I can't remember specifically everything that was said.

Q. Do you recall Judge Mounts cutting you off at any particular point, such as when you advised him that Mr. Alford was allegedly involved in other murders? Is that when he cut you off and said, "I don't want to know any more about that"? A. Mr. Roth, it was somewhere along that point, to the best of my recollection, but I can't specifically remember when it was.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. A-833

77-1490

LEARIE LEO ALFORD,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. A-833

LEARIE LEO ALFORD,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

OPINION BELOW

The opinion of the Florida Supreme Court sought to be reviewed is reported as *Alford v. State*, 355 So.2d 108 (Fla. 1977).

JURISDICTION

Respondent acknowledges that if the question presented constitutes a substan-

tial federal question, jurisdiction is properly invoked pursuant to 28 *U.S.C.* §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clauses of the 5th and 14th Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On October 16, 1973, the Honorable Marvin Mounts, Circuit Judge, pursuant to a recommendation by the jury that Petitioner be sentenced to death and after having made the appropriate findings of facts, sentenced Petitioner to death (Res. App. I).

An appeal was taken to the Supreme Court of Florida and that court affirmed the judgment and sentence. *Alford v. State*, 307 So.2d 433 (Fla. 1975). Petitioner filed a petition for a writ of certiorari in this

Court seeking review of said decision, and after due consideration this Court denied said petition. *Alford v. Florida*, 428 U.S. 912 (1976).

Following this Court's rendition of *Gardner v. Florida*, 430 U.S. 349 (1977), the Florida Supreme Court in this case, and in every other case decided by the Florida Supreme Court prior to *Gardner*, supra, entered an order directing the trial judge to file a response within twenty days ". . . stating whether he imposed the death sentence in the identified cause on the basis of *consideration* of any information not known to appellant. . ." (Pet. App. 13). The court further authorized appellant to file an application for relief within thirty days from receipt of the trial judge's response (Pet. App. 14).

Pursuant to said order Judge Mounts filed his response wherein he stated that he ". . . did *not consider* information unknown to the appellant in conjunction with any matter in this case. . ." (Pet. App. 12). Attached to Judge Mounts' response, *which is not included in Petitioner's appendix*, was a letter dated September 12, 1973 to Joel Padgett, the probation officer who prepared the presentence investigation report, which supported the statements contained in the response filed pursuant to *Gardner*, supra, (Res. App. II). In said letter Judge Mounts stated:

> ". . .in a case in which the jury has recommended the supreme penalty known to our law, that there well may be a constitutional right to disclosure of this confidential section to the defendant. As far as I know, there is not yet a judicial decision on what the meaning of 'factual material' in Rule 3.713(b) may be. I feel that if I cannot release the confidential section to the defendant, I should

> not review it myself in this particular case. I know that this means that I shall not have the benefit of a major portion of your work in this report because of this view and I regret that this is so.
>
> "Accordingly, do not deliver that section of your report to me." (Res. App. II)

On June 9, 1977, Petitioner filed a Motion to Vacate Death Sentence alleging he received a copy of the confidential evaluation portion of the presentence report from the Governor of the State of Florida, which is a part of Florida's clemency procedures, and that said report ". . . affirmatively contradicted. . ." Judge Mounts' response in that the report indicated that the judge was ". . . made *aware* of certain facts during his discussion with the Parole and Probation Officer." (Pet. App. 10).

Respondent filed its response to the motion to vacate (Res. App. III) wherein

it denied the allegation that the report contradicted Judge Mounts' response and urged that assuming Judge Mounts was "aware" of "certain facts", it didn't mean he "considered" those facts in imposing the sentence of death. Respondent urged *Gardner*, supra, was not applicable and that Petitioner was not entitled to a new sentencing hearing.

Oral argument was held and in due course the Florida Supreme Court rendered the decision sought to be reviewed denying Petitioner's motion to vacate.

QUESTION PRESENTED

WAS PETITIONER DENIED DUE PROCESS OF LAW BY THE TRIAL JUDGE IN IMPOSING SENTENCE BECAUSE HE MAY HAVE BEEN AWARE OF FACTS NOT DISCLOSED TO APPELLANT WHICH HE DID NOT CONSIDER IN IMPOSING SENTENCE?

WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner's argument apparently is that

his sentence was imposed in violation of *Gardner v. Florida*, supra, because the trial judge was aware of "certain facts" disclosed to him by a probation officer who prepared a presentence investigation report. Petitioner refers to the deposition of Joel Padgett that has not been made a part of the record nor served upon counsel for Respondent, and was apparently taken after the filing of the motion to vacate.

Respondent respectfully submits that the petition fails to present a substantial federal question and that this Court should decline to grant discretionary review. Moreover, Respondent urges that *Gardner v. Florida*, is not applicable to the instant case.

Prior to this Court's decision in *Gardner*, supra, Judge Mounts appreciated the constitutional question presented by the denial

of information from an individual facing the death penalty and directed the probation officer not to deliver the confidential section of his presentence report to him. Judge Mounts clearly felt that if the information could not be released to the defendant, then he should not review it himself. Of course, this Court's subsequent decision in *Gardner* vindicated Judge Mounts' judgment in this respect. His response shows that he did not consider any information not known to Petitioner in imposing his sentence and that response is uncontradicted. Indeed, reference to the written sentence imposed by Judge Mounts fails to indicate he relied on any evidence other than that presented to the jury in open court.

In contrast to the case sub judice, in *Gardner*, supra, the trial judge did review

confidential portions of the presentence investigation report which was not disclosed to counsel. Not only did the trial judge in *Gardner* consider the information in that report, he used the information as the basis to override the jury's recommendation that Gardner be sentenced to life imprisonment. 430 U.S. at 353.

Implicit in this Court's decision in *Gardner* is that a trial judge may disregard information contained in a presentence investigation report, 430 U.S. at 356 and 358, and Petitioner acknowledges this fact (Pet. at p. 6). Respondent fails to understand how a trial judge may elect to disregard known information to avoid delay, but Judge Mounts could not validly refuse to consider information which he may have had knowledge of because he couldn't release the information to Petitioner.

Petitioner suggests that because Padgett may have told the trial judge that the informant advised him that Petitioner admitted that he committed the crime and that Petitioner committed other crimes, he was not able to dispute the information. What difference does it make *why* a judge disregards information so long as he in fact disregards or does not consider it?

An examination of Judge Mounts' sentence imposed against Petitioner reveals he found Petitioner was never convicted of a felony and that he had no history of criminal activity (Res.App. I). If he had considered the statement made to him by Padgett (assuming they were made) he would not have made the finding that there was no history of criminal activity as a mitigating circumstance. Judge Mounts also found that the circumstantial evidence was such that there was

". . . no question of this defendant's guilt. . ." (Res. App. I). Therefore, the information that Petitioner admitted the killing was of no consequence to Judge Mounts, assuming Padgett advised Judge Mounts of that fact.

This case is not governed by *Gardner v. Florida*, because it is uncontradicted that Judge Mounts did not consider any information which was not disclosed in reaching his determination. This Court did not hold a judge must disclose information he has no intention of considering so a defendant may dispute it thereby allowing him to disregard it! How can anyone intelligently suggest that due process requires a person be given an opportunity dispute information that the court has no intention of considering in the first place. It isn't necessary to accomplish the desired result!

Counsel opines ". . . it is not possible for the trial judge to know what material is in dispute, if defendant has not been given an opportunity to point it out. . ." (Pet. at p. 6). Not true. In this case the trial judge declined to consider *any* information that was not revealed to Petitioner; therefore, there was no need to point out what, if anything, was disputed.

CONCLUSION

The trial judge did not review any material and did not receive a confidential presentence report in this case. In fact, he directed that it not be included in the presentence report. Therefore, *Gardner v. Florida*, supra, is inapplicable. The petition filed herein fails to raise a substantial federal question and this Court

should decline to grant review of the decision rendered by the Florida Supreme Court in this case.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

COUNSEL FOR RESPONDENT

APPENDIX I

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 73-159 CF MOUNTS

STATE OF FLORIDA

vs.

LEARIE LEO ALFORD,

Defendant

FILED
OCT 16 1973
JOHN B. DUNKLE, CLERK
CIRCUIT & COUNTY COURTS
(CRIMINAL D.V.)

FINDINGS OF FACT AND SENTENCE

Pursuant to Florida Statute 775.081, the Defendant, Learie Leo Alford, was charged by indictment with the crimes of Murder in the First Degree and Rape. Trial commenced on April 16, 1973. On April 26th, 1973 a jury of 12 found this defendant guilty of Murder in the First Degree and of Rape as charged. Following a recess to permit counsel to prepare for the separate sentencing proceeding, a majority of the jury recommended to the Court on May 3rd, 1973 that the defendant receive the death penalty.

The sentencing provisions of Florida Statute 921.141 and the recent case of State v. Carl Dixon, et al, Case Number 43,521, (Fla. 1973) require that sentencings in capital felony cases be supported in writing by the trial judge.

Upon my review of both trials, of my trial notes and of the presentence investigation, I find as follows with respect to aggravating circumstances and mitigating circumstances:

- - -AGGRAVATING CIRCUMSTANCES - - -

(a) The defendant in this case was not under sentence of imprisonment for any other crime.

(b) The defendant has never been convicted of another capital felony or of a felony involving the use or threat of violence to another person.

BEST COPY AVAILABLE

(c) The defendant did not knowingly create great risk of death to many persons.

(d) This capital felony of murder in the first degree was committed while this defendant was engaged in the commission of or in flight after committing a life felony which was rape and of which he was also convicted in the same trial.

(e) This capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) This capital felony was not committed for pecuniary gain.

(g) This capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) This capital felony was especially heinous, atrocious and cruel.

- - -MITIGATING CIRCUMSTANCES- - -

(a) This defendant has no significant history of prior criminal activity.

(b) This defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) The victim of this capital felony was not a participant in the defendant's conduct nor did she consent to his acts.

(d) This defendant was not an accomplice in the capital felony committed; he was the only participant.

(e) This defendant did not act under extreme duress or under the substantial domination of another person in the commission of this capital felony.

(f) The capacity of this defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

(g) The age of this defendant at the time of the commission of the crime is not a factor, he having reached his majority some years prior to the commission of the crime.

I find that aggravating circumstances (d) and (h) are present, that they have been established beyond a reasonable doubt and that mitigating circumstance (a) is present.

With respect to my finding that this capital felony was especially heinous, atrocious or cruel, I observe that I have been engaged in the administration of criminal justice since 1959. During that period of time I have observed a number of brutal and conscienceless crimes. Compared against that experience, the criminal acts of this defendant are particularly shocking heinous, atrocious and cruel. In this respect I cite the scene of the crime, the victim as depicted by photographs introduced into evidence in this case and the testimony of the pathologist describing the wounds, damage and injury occasioned to that pathetic childs body. It is inexpressibly cruel.

Next I note that this case presents a classic example of circumstantial evidence. I find that the circumstantial evidence here was clear and convincing; there is no question of this defendant's guilt, viewed against the process of a trial in which he was ably defended by two competent and thoroughly experienced trial attorneys.

It is ORDERED AND ADJUDGED that you, Learie Lee Alford having been found guilty by a jury of Murder in the First Degree and Rape, I now adjudge you to be guilty and find you to be guilty of Murder in the First Degree and Rape.

I now ask of you if you have any cause or reason as to why the Sentence of the Law and of this Court should not now be imposed?

For the conviction of the crime of Murder in the First Degree, it is the sentence of this Court that you receive the penalty of death.

The Court grants you credit for time served on this sentence from the date of your arrest, January 9, 1973, in the event the death penalty be held unconstitutional by the Supreme Court of the United States.

You are further advised that you have the right to appeal and that your appeal must be undertaken by the filing of a Notice of Appeal within thirty (30) days from today's date.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this 16th day of October, 1973.

MARVIN MOUNTS, JR., Circuit Judge
Criminal Division

APPENDIX II

THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA

MARVIN MOUNTS, JR.
JUDGE

COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA

September 12, 1973

Joel Padgett, Probation Supervisor
Probation and Parole Department
County Courthouse
West Palm Beach, Florida

Re: Learie Leo Alford

Dear Joel:

I know you have expended a great deal of time, effort and conscientious evaluation in the preparation of the pre-sentence report concerning Learie Leo Alford. I recall that you indicated to me that the revelation of the confidential section of this report to the defense would be damaging and compromising to sources who had confided in you. I respect your judgment in this.

I feel, however, in a case in which the jury has recommended the supreme penalty known to our law, that there well may be a constitutional right to disclosure of this confidential section to the defendant. As far as I know, there is not yet a judicial decision on what the meaning of "factual material" in Rule 3.713 (b) may be. I feel that if I cannot release the confidential section to the defendant, I should not review it myself in this particular case. I know that this means that I shall not have the benefit of a major portion of your work in this report because of this view and I regret that this is so.

Accordingly, do not deliver that section of your report to me.

Thank you.

Very truly yours,

Marvin Mounts Jr.

MARVIN MOUNTS, JR.
Circuit Judge

MM/ob
XC: Joel T. Daves, III, Esquire

A P P E N D I X III

IN THE SUPREME COURT OF FLORIDA

LEARIE LEO ALFORD,	*	
APPELLANT,	*	
-VS-	*	CASE NO. 44,647
STATE OF FLORIDA,	*	
APPELLEE.	*	

Docketed
6-16-77
Florida Attorney
General

RESPONSE TO MOTION TO VACATE

Comes now, Appellee, State of Florida, by and through its undersigned attorney pursuant to Rule 3.9(a), Florida Appellate Rules, and files this its Reply to the Motion to Vacate heretofore filed and says as follows:

I

The confidential evaluation dated September 17, 1973, does not contradict the written response filed by the Honorable Marvin U. Mounts, Jr. on May 10, 1977, as is evident by the letter of September 12, 1973, from Judge Mounts to Joel C. Padgett, the officer who prepared the report for the Florida Parole and Probation Commission.

II

Even assuming the trial judge was ". . . made aware of *certain facts* during his discussion with the Parole and Probation Officer. . ." that doesn't mean he *"considered"* those facts in imposing the sentence. There is a decided difference between being "aware" of certain facts and "considering" them. Indeed, in *Gardner* itself the United States

Supreme Court recognized this for it said ". . .[i]n those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material. . . ." Opinion at p. 10.

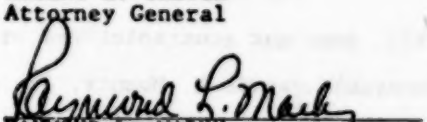
III

It is obvious from the record now before this Court that the trial judge did not impose the death sentence on the basis of information which was contained in the confidential portion of the presentence report and therefore *Gardner v. Florida*, 45 U.S.L.W. 4275 is inapplicable to the instant case. The sentence was based upon the evidence alluded to and for the reasons stated in the written finding of fact quoted by this Court in the opinion filed on January 29, 1975.

Appellee respectfully moves that the Motion to Vacate be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General



RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

COUNSEL FOR APPELLEE

CERTIFICATE OF SERIVCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion to Vacate has been forwarded to Mr. David Roth, Attorney at Law, Post Office Box 3466, West Palm Beach, FL 33402, via U. S. Mail, this 16th day of June, 1977.

Raymond L. Marky
Assistant Attorney General